

Excluding enforced disappearances from military jurisdiction

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Enforced disappearances often result in impunity, which is a “distinctive trait” of such crimes (UN Working Group on Enforced or Involuntary Disappearances, [2020 Annual Report](#), paras. 1, 93). A range of factors can contribute to States’ unwillingness and/or inability to bring perpetrators to justice. This can include the jurisdiction of military authorities to investigate, prosecute and punish gross human rights violations. This post outlines the approaches of the [UN Working Group on Enforced or Involuntary Disappearances](#) (WGEID or the Working Group) and the [UN Committee on Enforced Disappearances](#) (CED or the Committee) to military jurisdiction over enforced disappearances in the context of States’ obligations to investigate and prosecute such crimes.

Military jurisdiction as a pretext for impunity

Military jurisdiction can obstruct investigation and prosecution of gross human rights violations, thereby preventing accountability and denying victims’ right to justice. Numerous *UN Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions* have raised concerns that members of the armed forces may evade punishment before military courts due to an ill-conceived *esprit de corps* (e.g., [1997 Annual Report](#), para. 97; [2004 Annual Report](#), para. 49). Indeed, said UN Special Rapporteur noted in his [2008 Annual Report](#):

“When extrajudicial executions are committed by military personnel it usually falls to the national system of military justice to investigate, prosecute and punish. Yet, historically, the human rights track record of military justice has been dismal...At its best, military justice has been a separate and inferior system of justice. At its worst, it has provided a pretext for impunity...” (para. 48).

Several *UN Special Rapporteurs on the Independence of Judges and Lawyers* have also raised concerns regarding the independence and impartiality of military justice, noting that the military judicial system “is subject to pressure and interference by the military hierarchy” ([2007 Report on the Mission to the Democratic Republic of the Congo](#), para. 15). Examples include military judges being “threatened or attacked by members of armed forces as an intimidation tactic to ensure impunity” (*ibid*, para. 38) or active-duty officers trying their own subordinates for human rights violations ([1996 Report on the Mission to Colombia](#), para. 140).

Examples of military jurisdiction under national legislation

The Committee’s [Concluding Observations](#) contain numerous examples of States where military authorities have jurisdiction under national legislation – either

expressly or due to a lack of specific exclusion – to investigate and prosecute enforced disappearances. Regarding investigations on the one hand, there are examples of military police forces being competent to investigate enforced disappearances committed in a military context (CED [2014 Concluding Observations on the Netherlands](#), para. 18). On the other hand, regarding prosecutions, some national legal systems provide military courts with the jurisdiction to try enforced disappearances committed by military personnel in the exercise of their duties (CED [2017 Concluding Observations on Gabon](#), para. 23), in war time (CED [2014 Concluding Observations on Belgium](#), para. 21) or where members of the armed forces are accused of an offence under ordinary or military law (CED [2016 Concluding Observations on Tunisia](#), para. 20).

Regional and international human rights instruments and standards

At the regional level, Article 9-1 of the [1994 Inter-American Convention on Forced Disappearances of Persons](#) (Inter-American Convention) asserts that “Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions”. Furthermore, under [Article 9-2](#) of the Inter-American Convention, enforced disappearances “shall not be deemed to have been committed in the course of military duties”.

At the international level, no treaty-based international instrument contains specific provisions on military jurisdiction over gross human rights violations, such as enforced disappearances. However, Article 16-2 of the [1992 Declaration on the Protection of All Persons from Enforced Disappearance](#) (the 1992 Declaration) stipulates that persons allegedly responsible for enforced disappearances “shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts”. [Article 14](#) of the 1992 Declaration requires the prosecution and trial to be conducted by the “competent civil authorities of that State”.

Notable principles that also address this issue include Principle 29 of the [2005 Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity](#) and Principles 8-9 of the [2006 Draft Principles Governing the Administration of Justice through Military Tribunals](#) (Decaux Principles).

UN Working Group on enforced or involuntary disappearances

Under, *inter alia*, Articles 13 and 14 of the [1992 Declaration](#), States shall investigate and prosecute enforced disappearances. In line with Article 16-2 of the [1992 Declaration](#), the Working Group has recommended that ordinary courts’ jurisdiction should be guaranteed for human rights violations, regardless of whether the perpetrator was a member of the armed forces (e.g. WGEID [2007 Mission to Honduras](#), paras. 38, 66(a)(iv); [2012 Mission to Pakistan](#), para. 74). This should be codified in domestic criminal legislation (WGEID [Best practices in national criminal law on enforced disappearances](#), para. 57). The Working Group has also highlighted

that bringing perpetrators to justice before competent civilian courts is a crucial preventive measure (see, e.g. WGEID [2005 Annual Report](#), para. 599).

Regarding investigations, the Working Group has recommended that civil prosecution services conduct serious and prompt investigations into all complaints of human rights violations and that military prosecution services must be legally prevented from initiating or continuing investigations (e.g. WGEID [2011 Mission to Mexico](#), para. 98). The Working Group elaborated on investigations in its recent [2020 Report on standards and public policies for an effective investigation of enforced disappearances](#), holding:

“under certain circumstances, some States, such as those in post-conflict situations or States transitioning to democracy, should consider extending the prohibition of trial by any special tribunal, including a military tribunal, to include pretrial investigations, in order to restrict the participation of institutions and agencies that are suspected of committing or having committed enforced disappearances.” (para. 40).

The Working Group’s rationale is reflected in its assertion that victims and their relatives are denied access to justice where military justice systems lack the necessary independence and impartiality to address human rights violations, making it “extremely difficult to end impunity” (WGEID [2011 Mission to Mexico](#), para. 38).

UN Committee on enforced disappearances

Under, *inter alia*, Articles 6 and 12 of the [2006 International Convention for the Protection of All Persons from Enforced Disappearance](#) (ICPPED or the Convention), State Parties are obliged to investigate and prosecute enforced disappearances. The Convention does not contain an explicit prohibition on military jurisdiction over enforced disappearances. This is due to diplomatic negotiations aimed at adopting the text by consensus (CED [2014 Report on 5th and 6th Session](#), para. 16).

However, in 2015, the Committee issued a [Statement on enforced disappearances and military jurisdiction](#) (2015 Statement). Noting its opinion that “military jurisdiction could limit the effectiveness of investigations, prosecutions and trials of enforced disappearances” (2015 Statement, para. 2), the Committee reaffirmed military jurisdiction’s exclusion for gross human rights violations, including enforced disappearances (2015 Statement, para. 10). In doing so, the Committee took into account “the provisions of the Convention and the progressive development of international law in order to assure the consistency in the implementation of international standards” (2015 Statement, para. 10).

The Committee’s position is underpinned by the notion that the “right to justice for victims implies respect for the principle of independence and impartiality of the courts” (2015 Statement, para. 1). Indeed, when addressing military jurisdiction in its [Concluding Observations](#), the Committee has relied almost exclusively on [Article 11 ICPPED](#), subsection (3) of which reads: “[a]ny person tried for an

offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law”.

The Committee has repeatedly held that, as a matter of principle, military courts cannot provide the independence and impartiality required by the Convention to hear cases of human rights violations, such as enforced disappearance. It has therefore consistently recommended that State parties “take the necessary legislative or other measures to ensure that all cases of enforced disappearance remain expressly outside military jurisdiction and can be tried only by ordinary courts” (e.g. CED [2014 Concluding Observations on Belgium](#), para. 22).

It has made the same recommendation regarding investigations (e.g. [2013 Concluding Observations on Spain](#), para. 16). The Committee recently elaborated on the requirement of independence in the context of national legislation that did not specifically exclude military courts’ jurisdiction to “investigate allegations of enforced disappearances committed by military personnel” (CED [2019 Concluding Observations on Bolivia](#), para. 18). It recommended that “crimes of enforced disappearance allegedly committed by members of the armed forces are investigated and prosecuted by competent, independent and impartial prosecutors and judges who have no institutional ties to the entity to which the individual under investigation belongs” (*ibid*, para. 19).

Conclusion

While the [1992 Declaration](#) explicitly prohibits military jurisdiction to prosecute enforced disappearances, the Convention is silent on the matter. Nonetheless, both the Working Group and the Committee have excluded military jurisdiction over gross human rights violations, including enforced disappearances. In doing so, both bodies draw on administration of justice principles, notably the requirement of an independent and impartial court or tribunal. This responds to the fact that military jurisdiction can hinder investigation and prosecution of gross human rights violations, thereby preventing accountability and denying victims’ right to justice. By excluding enforced disappearances from military jurisdiction, the Working Group and the Committee address a contributing factor of concern in the fight against impunity.

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